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# Implementing Atkins: The Strengths & Weaknesses of In Re Hawthorne

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# *Notes*

# Implementing *Atkins*: The Strengths & Weaknesses of *In Re Hawthorne*

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## INTRODUCTION

On February 20, 2002, the United States Supreme Court decided the case of *Atkins v. Virginia*.[1] In *Atkins*, the Court created a categorical exemption from the death penalty for people with mental retardation, holding that the execution of such individuals violated the Eighth Amendment's prohibition on cruel and unusual punishments.[2] By carving out this exemption, *Atkins* placed a significant limit on the power of the states to execute their own sentences. However, what power *Atkins* took from the states with one hand, it gave back to the states with the other. For in the same opinion, the Supreme Court empowered the states to determine the standards and procedures to be used in implementing the newly announced exemption,[3] thereby giving the states significant control over the actual effect of *Atkins* on executions.

The State of California's primary attempt at implementing *Atkins* is Penal Code section 1376. This statute details a comprehensive set of procedures for state superior courts to use when evaluating requests for an *Atkins* exemption. But section 1376 does not apply in every situation where a request for *Atkins* relief may be raised. Specifically, section 1376

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1. 536 U.S. 304.

2. *Id.* at 321.

3. *Id.* at 317 ("[W]e leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.").

offers no guidance on how lower courts should address petitions for *Atkins* relief by individuals already on death row.

This open question was ultimately resolved by the California Supreme Court in *In re Hawthorne*.[4] In *Hawthorne*, Justice Janice R. Brown, writing for a unanimous court, set forth the specific standards and procedures to be used in implementing *Atkins* in the post-conviction setting, including how a claim of mental retardation should be raised, the burden of proof, the type of evidence that may be considered in proving mental retardation, and the entity responsible for determining if mental retardation exists (i.e., judge or jury).[5]

However, the most complicated issue dealt with by the court was the definition of mental retardation.[6] The court devoted almost two full pages of its nine-page opinion to devising an appropriate definition.[7] And it is not surprising the court found the issue to be so challenging. *Atkins* itself suggested that the most difficult issue in implementing the newly announced exemption would likely be determining which individuals qualified as mentally retarded.[8] A number of mental health law scholars have subsequently echoed this suggestion.[9] For instance, Professor Peggy M. Tobolowsky has stated, "the most important task for capital punishment jurisdictions in implementing *Atkins* is to define the 'mentally retarded offender.'"[10]

Despite the issue's complexity, the court eventually arrived at a definition of mental retardation.[11] The court held that a death row inmate seeking to prove mental retardation must show (1) significant subaverage intellectual functioning, (2) deficiencies in adaptive behavior, and (3) manifestation of these limitations prior to the age of eighteen. The *Hawthorne* court derived its definition largely from similar definitions endorsed by the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA).[12]

This Note argues that the California Supreme Court's definition of mental retardation and its rationale for that definition exhibit both strengths and weaknesses. Within the same opinion the court reaches both correct and incorrect conclusions about how to define mental retardation. The court's reasoning is both principled and thorough as

4. 35 Cal. 4th 40 (2005).

5. *See id.*

6. *Id.* at 47–49.

7. *Id.*

8. *Atkins*, 536 U.S. at 317.

9. *See, e.g.*, Douglas Mossman, Atkins v. Virginia: *A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 264–74 (2003).

10. Peggy M. Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution*, 30 J. LEGIS. 77, 86 (2003).

11. *Hawthorne*, 35 Cal. 4th at 48.

12. *Id.* at 47–48.

well as arbitrary and incomplete. By identifying the opinion's strengths this Note will highlight the positive contributions *Hawthorne* makes to the current debate on defining mental retardation in cases where *Atkins* is invoked.[13] Alternatively, by identifying and correcting some of the opinion's weaknesses, this Note will help prevent other state courts and legislatures addressing the definitional issue from falling prey to similar mistakes.

To this end, this Note proceeds in three parts. Part I describes the backdrop against which *Hawthorne* was decided. Specifically, it provides a brief description of the U.S. Supreme Court's decision in *Atkins v. Virginia* and the California Legislature's subsequent attempt at implementing *Atkins* in the pre-conviction context (California Penal Code section 1376). Part II then follows with a detailed description of the *Hawthorne* opinion, focusing specifically on the California Supreme Court's definition of mental retardation. Part III then addresses various aspects of the court's discussion of how to define mental retardation, pointing out the opinion's strengths and weaknesses. Part III.A focuses on the court's implicit decision that it was the appropriate body to decide how mental retardation should be defined, and Part III.B looks at the *Hawthorne* court's explicit choice to adopt a clinical based definition of mental retardation. Finally, Part III.C of this Note assesses the court's elaboration of the exact contours of the two essential prongs of mental retardation: (1) subaverage intellectual functioning and (2) problems in adaptive behavior.

## I. BACKGROUND

### A. *ATKINS V. VIRGINIA*

In *Atkins v. Virginia* the United States Supreme Court banned the execution of individuals with mental retardation.[14] According to Justice Stevens, writing for a five-member majority,[15] the practice of executing people with mental retardation violated the Eighth Amendment's prohibition against "cruel and unusual punishments."[16] To reach this conclusion, the Court used a two-part inquiry required by Eighth Amendment precedent.

The first question addressed by the Court under this inquiry was whether the execution of people with mental retardation was consistent

13. A number of states are still trying to decide how to define mental retardation in cases where the *Atkins* exemption is invoked. *See* Nava Feldman, *Application of the Constitutional Rule of* Atkins v. Virginia *That Execution of Mentally Retarded Persons Constitutes Cruel and Unusual Punishment in Violation of the Eighth Amendment*, 122 A.L.R. 5th 145 (2004).

14. 536 U.S. 304, 321 (2002).

15. The other members of the majority included Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer.

16. *Atkins*, 536 U.S. at 321.

with the nation's evolving standard of decency. To answer this question, the Court took notice of how many state legislatures had banned the practice.[17] The Court noted that all of the recent legislation favored prohibiting the practice of executing the mentally retarded rather then permitting it.[18]

The second part of the Court's Eighth Amendment inquiry focused on whether in its own judgment the practice of imposing capital punishment against the mentally retarded was cruel and unusual.[19] The Court found two reasons to agree with the nation's consensus that executing the mentally retarded was cruel and unusual. First, the Court reasoned that executing the mentally retarded would not serve either of the traditional purposes of the death penalty. Retribution would not be served because the mentally retarded suffer from lower levels of consciousness and are thus less culpable for their crimes.[20] Deterrence would also not be served because mentally retarded offenders are less capable of understanding "the possibility of execution as a penalty and, as a result, control[ling] their behavior based upon that information."[21] Second, the Court found that mentally retarded defendants possessed a reduced ability to aid in their own defense.[22] For example, a mentally retarded defendant is more likely to give a false confession, be unable to offer mitigating evidence, and is less likely to provide meaningful assistance to counsel.[23]

In sum, the Court rendered an affirmative answer to both parts of the required Eighth Amendment inquiry. It found that our nation's evolving standards of decency would not permit the continued execution of the mentally retarded and that, in its own judgment, the continued use of the practice was an excessive form of punishment. The Court thus prohibited the execution of the mentally retarded.[24]

However, the creation of a categorical exemption from the death penalty for the mentally retarded was not the only significant part of the *Atkins* opinion. After announcing the exemption, the Supreme Court stated, "we leave to the States the task of developing appropriate ways to enforce the constitutional restrictions upon its execution of sentences."[25] Although this one sentence amounts to only a small portion of the Court's lengthy opinion, it has proven to be extremely significant. Since

17. *Id.* at 312.
18. *Id.*
19. *Id.* at 313.
20. *Id.* at 319.
21. *Id.* at 319–20.
22. *Id.* at 320.
23. *Id.*
24. *Id.* at 321.
25. *Id.* at 317 (citing Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

*Atkins*, debate about how to implement the Court's decision has been just as vigorous as debate about whether the decision was correct.[26]

### B. California's Legislative Response: California Penal Code Section 1376

California's first attempt at implementing *Atkins* came through the legislative process. In 2003 the California Legislature enacted Penal Code section 1376, which provides California courts with guidance on a number of the procedural issues left unresolved by *Atkins*.[27] First, section 1376 offers a definition of mental retardation for use in pre-conviction cases. Mental retardation is defined as "the condition of significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested before the age of 18."[28] Second, the statute addresses how mental retardation should be proven, requiring that any individual seeking an exemption from the death penalty first submit a declaration by a qualified psychiatric expert.[29] Third, section 1376 allows the offender to elect either a judge or jury as the fact-finder.[30] Finally, section 1376 mandates that the defendant bear the burden of proving mental retardation by a preponderance of the evidence.[31]

Despite the statute's resolution of so many post-*Atkins* implementation issues, its effectiveness is limited. This is because section 1376 only applies in pre-conviction cases where the death penalty is being sought.[32] In other words, "the statute makes no provision for cases in which the death penalty has already been imposed."[33] As a result, the task of devising the appropriate standards and procedures for implementing *Atkins* in post-conviction cases was left to the California Supreme Court.

## II. *In Re Hawthorne*

The court took up this challenge in the case of *In re Hawthorne*.[34] *Hawthorne* involved the habeas corpus petition of Anderson Hawthorne, Jr. (Anderson). Anderson was convicted in 1985 of murdering two

26. *See, e.g.*, Alexis Krulish Dowling, *Post-*Atkins *Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 Seton Hall L. Rev. 773 (2003); Note, *Implementing* Atkins, 116 Harv. L. Rev. 2565 (2003) [hereinafter *Implementing Atkins*].

27. Cal. Penal Code § 1376 (West 2003). *See generally* Anthony C. Williams, *Review of Selected 2003 California Legislation: Penal Chapter 700: "Too Dumb to Die": Implementing the U.S. Supreme Court's Ban on Executing the Mentally Retarded*, 35 McGeorge L. Rev. 616 (2004).

28. Cal. Penal Code § 1376(a).

29. *Id.* § 1376(b)(1).

30. *Id.*

31. *Id.* § 1376(b)(2).

32. *Id.* § 1376(b)(1).

33. *In re* Hawthorne, 35 Cal. 4th 40, 45 (2005).

34. *Id.*

individuals and attempting to murder several others.[35] He was sentenced to death. Subsequent to his sentencing, Anderson filed at least three separate habeas petitions arguing that he was mentally retarded and therefore should be exempt from the ultimate punishment.[36]

In support of his claim, Anderson presented evidence that he had always exhibited an extremely low level of intellectual functioning.[37] Almost all of his IQ tests had resulted in scores between seventy and seventy-five, which put him in the bottom three percent of overall intellectual functioning in the population.[38] Additionally, Anderson presented credible evidence of serious adaptive behavior problems. Starting in his early childhood, Anderson had problems reading and writing, communicating with others, and he was a slow learner.[39] Finally, Anderson provided declarations from two different experts in psychiatry and neurology who had reviewed his case file and concluded that he was mentally retarded.[40] One expert was even willing to state that Anderson was "one of the most profoundly impaired individuals ever seen within a forensic population."[41]

Although this evidence would appear persuasive, each of Anderson's original habeas petitions was denied.[42] The California Supreme Court summarily denied Anderson's requests for relief based on the case of *Penry v. Lynaugh*, which had been issued thirteen years before *Atkins* and had determined that execution of the mentally retarded did not violate the Eighth Amendment's prohibition against excessive punishments.[43] But Anderson filed a fourth habeas corpus petition after *Atkins*, and the court was thus required to reconsider his request for an exemption based on mental retardation.

The supreme court granted Anderson's petition and held that he was entitled to a hearing on whether he should be exempted from the death penalty.[44] In doing so the court established a number of standards and procedures for assessing petitions filed by death row inmates seeking *Atkins* relief. For instance, the court announced that mental retardation claims should be raised through a petition for a writ of habeas corpus and should include a declaration by a qualified psychiatric expert stating that the petitioner was mentally retarded and the basis for that opinion.[45] The

35. People v. Hawthorne, 4 Cal. 4th 43, 51 (1992).
36. *Hawthorne*, 35 Cal. 4th at 43.
37. *Id.* at 51.
38. *Id.* & n.5.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 43.
43. *Id.* (citing Penry v. Lynaugh, 492 U.S. 302 (1989)).
44. *Id.* at 51–52.
45. *Id.* at 47.

court also held that a judge, not a jury, should answer the question of whether the inmate was mentally retarded.[46]

However, the lengthiest discussion in *Hawthorne* was devoted to the topic of defining mental retardation. To begin its discussion, the supreme court made the implicit decision that it was the appropriate body to decide how mental retardation should be defined.[47] Having made this choice, the court turned to the question of whether it should adopt a definition of mental retardation already endorsed by the medical community. Ultimately the court decided to adopt a clinical based definition, finding support in the U.S. Supreme Court's references to this type of definition in *Atkins*.[48] Accordingly, the court announced that its definition would be composed of three clinically recognized prongs: (1) significantly subaverage intellectual functioning, (2) deficiencies in adaptive behavior, and (3) manifestation of these limitations before the age of eighteen.[49] Finally, the court detailed the exact contours of the first two prongs. With regards to the intellectual functioning prong, the court declined to establish a fixed IQ requirement.[50] Instead it indicated that any evidence relating to subaverage intellectual functioning should be considered.[51] As for the adaptive behavior prong, the court set forth a specific list of areas the petitioner would have to show were deficient, including communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, and work.[52]

With this discussion in mind, Justice Chin, joined by Justice Kennard, wrote a concurring opinion focusing on the majority's definition of mental retardation.[53] Initially Justice Chin expressed agreement with the majority's decision not to set an express minimum IQ requirement. However, he also concluded that lower courts should rarely find an offender mentally retarded if any of his or her IQ scores were above the seventy to seventy-five range.[54]

## III. UNDERSTANDING *HAWTHORNE*: STRENGTHS AND WEAKNESSES

Initial reactions to the mental retardation definition announced by the *Hawthorne* court have been mixed. Some members of the legal community have characterized the court's discussion as well-reasoned and believe that an appropriate definition was chosen.[55] Other

46. *Id.* at 49.
47. *See id.* at 47.
48. *Id.* at 47–48.
49. *Id.* at 48.
50. *Id.*
51. *Id.* at 49.
52. *Id.* at 47–49.
53. *Id.* at 52–53 (Chin, J., concurring).
54. *Id.* at 52 (Chin, J., concurring).
55. *See* Mike McKee, *California Supreme Court Applies Retardation Criteria to Death Row*

commentators have been less receptive to the court's definition.[56]

Both sides may be correct. The *Hawthorne* court's discussion of how to define mental retardation has both strengths and weaknesses. In some instances the court arrived at the correct conclusion, but did so with insufficient analysis, while in other instances, the court engaged in more thorough and principled analysis, but ultimately reached the wrong conclusion. To support this argument, this Part examines each of the three major components of the court's definitional discussion, including: (1) who should decide how mental retardation should be defined (court or legislature), (2) what type of definition should be adopted (clinical or legal), and (3) how an inmate should prove the two primary elements of mental retardation—subaverage intelligence and deficient adaptive skills. With regards to each component, this Part looks first at the court's reasoning and then at the court's conclusion.

### A. WHICH ENTITY DECIDES: COURT OR LEGISLATURE

The first component of the court's discussion on defining mental retardation involved the question of which entity should decide the issue.[57] Ultimately the *Hawthorne* court decided that it was the appropriate body to define mental retardation for purposes of assessing post-conviction *Atkins* claims.

#### 1. *Reasoning Assessment*

In announcing this conclusion, the court engaged in completely deficient reasoning. In fact, the supreme court offered no reasoning at all for why it was the appropriate body to decide the definitional issue. This failure is problematic given the existence of at least two arguments in favor of the court deferring the issue to the legislature.

First, nothing in *Atkins* indicates that state courts should address how the mental retardation exemption should be implemented. The only relevant statement made by the Supreme Court was that it was leaving "to the *States*" the task of enforcing the new constitutional ban on execution of the mentally retarded.[58] There is no indication that the Court intended "to the States" to mean state courts, as opposed to state legislatures. In fact there may be evidence to the contrary. As discussed above, in determining whether a national consensus had developed against executing the mentally retarded, the Supreme Court looked to state legislatures and not to state courts.[59] The *Hawthorne* court failed to

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*Inmates*, THE RECORDER, Feb. 14, 2005, at A1.

56. *See* Press Release, Criminal Justice Law Foundation, California Supreme Court Announces Rules for Retardation Claims in Death Penalty Cases (Feb. 10, 2004), *available at* http://www.cjlf.org/releases/05-05.htm.

57. *Hawthorne*, 35 Cal. 4th at 46–47.

58. Atkins v. Virginia, 536 U.S. 304, 317 (2002) (emphasis added, textual alteration omitted).

59. *Id.*

even mention this fact.

The court also failed to address the fact that a number of other state courts had already found deference to their states' legislatures appropriate in dealing with *Atkins* implementation issues.[60] According to many of these courts, a court's job is to interpret the law, not make it.[61] For example, in *People v. Pulliam*, the defendant, a death row inmate, filed a post-conviction habeas petition seeking to have her conviction overturned and her death sentence mitigated.[62] One of her grounds for requesting relief was that she was mentally retarded.[63] The defendant essentially claimed that after *Atkins* the state's enforcement of her death sentence would violate the Eighth Amendment. The Supreme Court of Illinois agreed with the defendant's claim and remanded her case so that a hearing on her mental retardation status could be conducted.[64] However, the court chose not to establish any permanent standards or procedures for resolving any similar claims going forward. According to the court, to do so would usurp the authority of the state legislature.[65] The establishment of such standards and procedures was a task best left "to the determination of the legislature following discussion and debate."[66] The *Hawthorne* court's failure to address *Pulliam*, or any case like it, casts serious doubt on the validity of the court's conclusion that it was the appropriate body to define mental retardation.

2. *Conclusion Assessment*

Despite the dearth of reasoning in this area, the California Supreme Court ultimately arrived at the correct conclusion that it was the appropriate body to decide how mental retardation should be defined. Although not mentioned, at least three justifications support the court's choice.

First, the court might have argued that it was required to decide how mental retardation would be defined as part of its general obligation to give effect to every right secured by the federal Constitution.[67] If the court had circumvented the definitional issue, many death row inmates might have been unable to take full advantage of the death penalty exemption announced in *Atkins*. Such a scenario occurred quite often in the immediate wake of the *Atkins* decision.[68] Because most state trial

60. *E.g.*, People v. Pulliam, 206 Ill. 2d 218 (2002); State v. Williams, 831 So. 2d 835 (2002); *In re* Perkins v. State, 851 So. 2d 453 (2002).

61. *See, e.g.*, *Pulliam*, 206 Ill. 2d at 260.

62. *Id.* at 223–24.

63. *Id.* at 234–36, 257–60.

64. *Id.* at 257.

65. *Id.* at 260.

66. *Id.*

67. *See* Mooney v. Holohan, 294 U.S. 103, 113 (1935).

68. *See, e.g.*, *Pulliam*, 206 Ill. 2d at 260; *Feldman*, *supra* note 13, § 7.

courts were not given a precise definition with which to assess requests for *Atkins* relief, they simply reviewed the original case file to make sure that basic due process review standards had been met.[69] A slew of mentally retarded inmates were thus prevented from obtaining relief because their original claims had been given basic due process review.

In California this result would have been unacceptable. It has long been recognized that the courts of California have an inherent duty to ensure that each individual has the ability to take *full advantage* of the rights guaranteed to them by the Constitution, in this case the right to be exempt from the death penalty based on a valid claim of mental retardation.[70] The Mississippi Supreme Court articulated similar reasoning in justifying its decision to define mental retardation in post-conviction cases.[71] As that court stated, "in order to fulfill [the court's] obligation to safeguard every guarantee of the constitution [the court] must address the *Atkins* decision, the definition of mental retardation to be used in our courts, and the procedure to be used for *Atkins* claims."[72]

A second justification in favor of the court's conclusion is provided by the judiciary's unique role in habeas corpus cases. Because the California Constitution provides the judicial branch with original jurisdiction over claims raised by habeas corpus petition, courts possess the inherent power to decide how these petitions will be resolved.[73] Particularly in cases where fundamental constitutional rights are at issue, the courts have no duty to defer to the legislature on the standards and procedures used to assess claims raised by individuals via habeas petition.[74] This principle is perhaps best described by the California Court of Appeal in *Scott v. Larson*.[75] In that case the petitioner filed a habeas corpus petition seeking to take advantage of a newly discerned constitutional right.[76] Although the legislature had provided no procedures for addressing the petitioner's new claim, the court held:

> Human Rights are not to be . . . frittered away or utterly destroyed. . . . The failure of [the legislature] to perform its duty in arranging and providing for a detail in connection with a broader and more comprehensive privilege should work no injury or prejudice to nor lessen the right for which special constitutional provision had been made. In the absence of legislative provision therefor, the courts have inherent power to regulate the practice and to provide [a procedure]

69. *Pulliam*, 206 Ill. 2d at 260.

70. Bixby v. Pierno, 4 Cal. 3d 130, 141 (1971).

71. Chase v. State, 873 So. 2d 1013, 1023 (2004).

72. *Id.*

73. *E.g.*, People v. Jordan, 65 Cal. 644 (1884).

74. *Id.*; *accord* Valdes v. Cory, 139 Cal. App. 3d 773 (1983); Citizens Utils. Co. v. Superior Court of Santa Cruz County, 59 Cal. 2d 805 (1963).

75. 82 Cal. App. 46 (1927).

76. *Id.* at 49–50.

for every just want relative to the procedure before them.[77]

This principle justifies the court's actions in *Hawthorne*. In deciding that it was the appropriate body to define mental retardation, the court should have stated that it was merely exercising its broad authority to establish those standards and procedures needed to resolve a constitutional claim raised by habeas corpus petition.

A third reason for concluding that the *Hawthorne* court's decision to define mental retardation was the correct one is rooted in practicality and compassion. At the time *Hawthorne* was announced, there were at least thirty men on California's death row who had already claimed they were mentally retarded. And national statistics suggest that the actual number suffering from the condition could even be higher.[78] To wait for the slow deliberative process of the legislature to establish the procedures that should be used to address the claims of so many inmates would have been impractical and uncompassionate. This was the reasoning advanced by the Texas Court of Criminal Appeals in *Ex Parte Briseno*.[79] Like *Hawthorne*, the court in that case was confronted with the task of establishing specific standards and procedures to be used by Texas state courts in addressing post-conviction requests for *Atkins* relief.[80] Noting that at least thirty-five men on death row had already made claims of mental retardation, the court held that it could not wait for the legislature to provide the appropriate guidance.[81] The court summarized its reasoning by stating:

> The Texas Legislature has not yet enacted legislation to carry out the *Atkins* mandate. Nonetheless, this Court must now deal with a significant number of pending habeas corpus applications claiming that the death row inmate suffers from mental retardation and thus is exempt from execution. Recognizing that "justice delayed is justice denied" to the inmate, to the victims and their families, and to society at large, we must act during this legislative interregnum to provide bench and bar with . . . judicial guidelines in addressing *Atkins* claims. Thus, we [choose] to set out the [above described] judicial standards for courts considering such claims.[82]

The California Supreme Court might have offered a similar justification for its decision to establish a definition for mental retardation in *Hawthorne*. To the thirty or more men on California's death row claiming mental retardation, waiting for the legislature to decide important issues needed for resolution of their claims would have

77. *Id.* at 50–51.

78. Hudson Sangree, *Justices Say Retardation is More than IQ*, S.F. DAILY J., Feb. 11, 2005, at 5; Tobolowsky, *supra* note 10, at 120.

79. 135 S.W.3d 1, 5 & n.7 (2004).

80. *Id.* at 4.

81. *Id.* at 5.

82. *Id.*

been justice denied.

### B. What Type of Definition: Clinical or Legal?

The second component of the court's discussion defining mental retardation concerned the issue of whether the definition should be clinical or legal in nature. Justice Brown, writing for the majority, eventually decided to adopt a clinical based definition. As such, any death row inmate seeking an *Atkins* exemption must prove each of three clinically recognized prongs: (1) significantly subaverage intellectual functioning, (2) deficiencies in adaptive behavior, and (3) manifestation of these limitations before the age of eighteen.

#### 1. *Reasoning Assessment*

As was the case with the *Hawthorne* court's conclusion that it should define mental retardation, Justice Brown's decision to adopt a clinical based definition is plagued by insufficient reasoning. The court's primary rationale for making this choice was the Supreme Court's reference to this type of definition in *Atkins*.[83] While this rationale may lend some support to the court's choice, exclusive reliance on it was inappropriate. There are a number of reasons to doubt the wisdom of adopting a purely clinical based definition, none of which were discussed by the court.

To start with, the level of functioning needed to meet the medical community's concept of mental retardation might not coincide with the level of functioning a majority of Californian's would say is necessary. Because the Supreme Court's decision in *Atkins* was based on exempting only those offenders with mental retardation around whom a general "consensus" had formed, it is the citizenry's conceptualization of mental retardation that should govern the issue.[84] The court in *Ex Parte Briseno* expressed this sentiment exactly when it stated "we . . . *must* define mental retardation [according] to that level and degree at which *a consensus of Texas citizens* would agree that a person should be exempted from the death penalty."[85] Noting that in Texas, a consensus had not yet formed around all those persons whom the mental health

83. *In re* Hawthorne, 35 Cal. 4th 40, 47 (2005). Some might contend that the supreme court also adopted a clinical based definition in order to be consistent with the clinical based definition already adopted by the Legislature in pre-conviction cases. *See* Cal. Penal Code § 1376 (West 2003); *Hawthorne*, 35 Cal. 4th at 47–48. I agree that consistency might have played a factor in the court's choice of a definition of mental retardation endorsed by the medical community, but I do not agree in this context that the court's aim was to be consistent with California's Legislature. I believe the only reason the court cited the Legislature's definition was that it too cited *Atkins*'s references to the AAMR and APA definitions, thus offering further support for the court's own judgment that it should be consistent with what was announced in *Atkins*.

84. Atkins v. Virginia, 536 U.S. 304, 311–16 (2002). Other authors raised the concern that state courts may be apt to adopt a clinical based definition of mental retardation that is inconsistent with a definition their citizenry would endorse. *E.g.*, *Implementing Atkins*, *supra* note 26, at 2570.

85. *Id.*

profession might diagnose as mentally retarded, the court adopted a definition slightly different than what is currently endorsed by the medical community.

The situation confronting the court in *Hawthorne* was no different. There was virtually no evidence that a consensus among the citizens of California had developed in favor of a purely clinical model of mental retardation. In fact there is some evidence to the contrary. The California legislature chose to adopt a definition of mental retardation in pre-conviction cases slightly different than what is endorsed by the AAMR and the APA.[86] If the legislature reflects the consensus of the citizenry (as *Atkins* suggests), then *Hawthorne* may have been wrong to adopt a purely clinical definition. But more importantly, by not addressing this issue the court's reasoning in this area was left wanting.

A related concern ignored by *Hawthorne* is the difference in goals between the mental health and legal communities in defining mental retardation. The primary goal for clinicians has been to arrive at a definition that reflects the new view of mental retardation as an "offshoot of a set of environmental interactions," rather than an immutable disorder.[87] Thus, definitions endorsed by the medical community have moved away "from the labeling of individuals towards the [flexible] description of the person and his or her needs for support."[88] This may be inconsistent with the type of definition sought by the legal community. Lawyers and judges are likely to prefer a bright line definition that will capture the exact person identified as being less culpable and deterrable by the Supreme Court in *Atkins*.[89] From the perspective of the legal system, "the [focus] is not, what help does this person need to attain a normal and fulfilling life, but rather, is this person impaired enough to escape execution for his crimes."[90] Given this unresolved tension between the mental health and legal communities the court's adoption of a purely clinical based definition may not have been an appropriate choice.

The final basis for finding the court's reasoning here insufficient is

86. *See* CAL. PENAL CODE § 1376. For example, the latest AAMR definition includes broad categorical areas where the individual's cognitive limitations and behavioral problems should manifest themselves. *See* AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 80 (10th ed. 2002) [hereinafter AAMR MANUAL] ("Mental Retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as *expressed in conceptual, social, and practical adaptive skills.*") (emphasis added). The definition adopted by the California Legislature does not conform to this list.

87. *See* Robert L. Schalock et al., *The Changing Conception of Mental Retardation: Implications for the Field*, 32 MENTAL RETARDATION 181, 182 (1994); *see also Implementing Atkins*, *supra* note 26, at 2577 (citing Schalock et al).

88. Schalock et al., *supra* note 87, at 183.

89. *See Implementing Atkins*, *supra* note 26, at 2577.

90. *Id.*

that courts have routinely constructed their own definitions of legally relevant mental health terms without relying on the medical profession.[91] A primary example is the Supreme Court's definition of the term "competent." In the many cases where the word "competent" is legally relevant (e.g., competency to stand trial, competency to refuse treatment) the Court has chosen to develop its own definition.[92] For example, in the case of competency to stand trial, the Supreme Court adopted a non-clinical based definition of "competency," stating that competency means "whether [the individual] has sufficient present ability to consult with his lawyer with a reasonable degree of understanding—and whether [the individual] has a rational as well as factual understanding of the proceedings against him."[93] Some have argued that this definition of competency might be completely different than what a clinician would endorse.[94] For example, a clinician may classify someone as incompetent regardless of his or her ability to communicate with a lawyer, preferring instead to focus on the person's psychiatric diagnosis or on a combination of the individual's present mental state and the type of charges being faced.[95] Given this fact, it is not *a priori* that the court in *Hawthorne* should have relied exclusively on the medical community to define mental retardation. At the very least the court should have addressed this issue in explaining why it chose to adopt a clinical based definition.

2. *Conclusion Assessment*

Even with holes in the court's reasoning, the decision to adopt a clinical based definition of mental retardation was the correct one. Like the court's decision to take on the task of defining mental retardation, a number of unarticulated rationales support the court's decision to use a clinical based definition. Three in particular are worth mentioning.

First, the court might have explained that adoption of a purely clinical definition was required by the Supreme Court's holding in *Atkins*. In that case the Court stated that its death penalty exemption would extend only to those defendants who "f[e]ll within in the range of mentally retarded offenders about whom there [was] a national consensus."[96] The current national consensus seems focused on the use of a purely clinical definition of mental retardation. More than twenty-five

91. *E.g.*, Dusky v. United States, 362 U.S. 402, 402 (1960).

92. *See* Drope v. Missouri, 420 U.S. 162, 171–72 (1975); Godinez v. Moran, 509 U.S. 389 (1993).

93. *Dusky*, 362 U.S. at 402.

94. *C.f.* Richard J. Bonnie, *The Competency of Defendants with Mental Retardation to Assist in Their Own Defense*, *in* THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION 100–01 (Conley et al. eds., 1994) [hereinafter Bonnie, *Assist in Their Own Defense*].

95. *See id.* at 101; Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539, 540–49 (1993) [hereinafter Bonnie, *Beyond* Dusky *and* Drope].

96. Atkins v. Virginia, 536 U.S. 304, 317 (2002).

of the thirty-six[97] states permitting the death penalty have adopted a purely clinical definition.[98] Since our state legislatures are presumed to reflect the will of the state citizenry, any court attempting to define mental retardation should have to comply with this consensus and adopt a purely clinical definition.[99] In order to be consistent with *Atkins*, the *Hawthorne* court was arguably required to adopt a purely legal definition.[100]

Another argument supporting the court's conclusion is that adoption of a clinical based definition helps to promote the uniform application of the death penalty, an objective the Supreme Court has held is essential to the continued use of the ultimate punishment.[101] Because most states implementing *Atkins* have adopted clinical based definitions of mental retardation,[102] the *Hawthorne* court's adoption of a similar definition would help to ensure that inmates will not be subject to death in one jurisdiction but only a life sentence in another.

For instance, Anderson Hawthorne, Jr. will likely be able to prove each of the three prongs of the clinical based definition adopted by the California Supreme Court. His very low IQ scores are good evidence of a significant impairment in intellectual functioning and his problems in learning, communicating, and other basic skills suggest he possesses the requisite limits in adaptive behavior. Moreover, each of these deficiencies was observable before the age of eighteen. If these traits meet the test set forth in *Hawthorne*, they probably also satisfy the clinical based tests adopted in other states. Thus, Anderson would likely receive the same punishment in each state. If *Hawthorne* had not adopted a definition of mental retardation endorsed by the mental health community, this uniform result would not have been achieved.

A final justification for the court's decision to adopt a clinical based

97. Although thirty-eight states had permitted the imposition of the death penalty for some years, the New York and Kansas death penalty statutes were declared unconstitutional in 2004, thus bringing the number down to thirty-six. Death Penalty Information Center, State by State Information (2005), *at* http://www.deathpenaltyinfo.org/state.

98. Tobolowsky, *supra* note 10, at 89–93.

99. *See Atkins*, 536 U.S. at 311–17.

100. Opponents of this analysis might argue that this proposition is inconsistent with my argument that one of the weaknesses in the court's opinion is its failure to address the possibility that a consensus has not developed in California surrounding a clinical based definition. *See supra* notes 84–85 and accompanying text. However, I think this argument proves too much. While I did argue that a *California* consensus had perhaps not developed around a clinical based definition, I did not argue that a *national* consensus had not formed around one. As to this proposition it seems there is no doubt.

101. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); *cf.* Jennifer H. van Dulmen-Krantz, *The Changing Face of the Death Penalty in America: The Strengths and Weaknesses of* Atkins v. Virginia *and Policy Considerations for States Reacting to the Supreme Court's Eighth Amendment Interpretation*, 24 HAMLINE J. PUB. L. & POL'Y 185 (2002).

102. *See* Tobolowsky, *supra* note 10, at 89–93.

definition is one already set forth in the *Hawthorne* opinion[103]—the numerous references to clinical based definitions by the Supreme Court in *Atkins*.[104] That the high court chose to rely so heavily on these definitions provides a persuasive argument that a state should use a similar definition in defining which offenders may take advantage of the *Atkins* holding.[105] With so many references, the Supreme Court arguably sent a signal that it did not want states to extend the *Atkins* exemption to any individual outside the narrow band of offenders who may properly be classified as mentally retarded according to the AAMR or APA.[106]

However, in offering this justification the *Hawthorne* court did not go far enough. Not only were clinical based definitions endorsed in *Atkins*, they were also endorsed by the Supreme Court in its first decision dealing with mental retardation and the death penalty, *Penry v. Lynaugh*.[107] Although the Supreme Court split five to four in that case in favor of allowing execution of mentally retarded individuals, the court unanimously agreed that the relevant definition for mental retardation was the one endorsed by the AAMR.[108] When considered in conjunction with the other justifications described above, the court's consistent reliance on definitions endorsed by the APA and AAMR provides strong evidence that the *Hawthorne* court made the correct choice in defining mental retardation in post-conviction cases based on a clinical model.

### C. How to Prove Subaverage Intellectual Functioning and Deficiencies in Adaptive Behavior

The third and final aspect of the supreme court's discussion of the definition of mental retardation in post-conviction *Atkins* cases concerns Justice Brown's elaboration of how an inmate is to prove the two essential prongs of mental retardation—subaverage intellectual functioning and problems in adaptive behavior. While earlier components of the court's discussion may have exhibited the combination of insufficient reasoning but correct conclusions, the court's discussion here reflects the opposite. In discussing the showing that must be made for each prong, the court displays highly sophisticated and well-supported reasoning, but eventually reaches incorrect conclusions.

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103. *In re* Hawthorne, 35 Cal. 4th 40, 47 (2005).

104. *Atkins*, 536 U.S. at 309 & n.3, 317–18.

105. *See* Tobolowsky, *supra* note 10, at 87 ("These references to [clinical based definitions] in . . . Atkins . . . provide guidance to the states regarding the Court's understanding of the category of offenders covered by its ruling[] . . . .").

106. *See* James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11, 12 (2003), *available at* http://www.deathpenaltyinfo.org/MREllisLeg.pdf.

107. 492 U.S. 302, 335 (1989).

108. *Id.* at 308; Tobolowsky, *supra* note 10, at 87.

1. *Subaverage Intellectual Functioning*

With respect to the intellectual functioning prong of its definition, the supreme court held that any and all evidence of subaverage intelligence should be considered.[109] In doing so it eschewed setting a single fixed IQ score necessary to qualify an individual as mentally retarded, an approach adopted in a number of other states implementing *Atkins*.[110] However, Justice Chin's concurrence also seemed to set a general IQ range of seventy to seventy-five above which someone seeking to qualify as mentally retarded cannot fall.[111]

*a. Reasoning Assessment*

In defining the intellectual functioning prong in this way (as opposed to setting a fixed IQ score) the supreme court offered three separate rationales, each thoroughly supported and well-reasoned.

*Inconsistency with the Legislature*: First, the court held that adoption of a fixed IQ cutoff would be inconsistent with the state legislature's approach to defining subaverage intellectual functioning.[112] According to Justice Brown, the California Legislature made no mention of any minimum IQ requirement when it passed Penal Code § 1376, and thus neither would the court.[113] The court's instinct to adopt a definition consistent with that of the state legislature is well-reasoned. As the *Atkins* court itself noted (and as I have mentioned before), the Constitution only prohibits execution of those mentally retarded individuals whom a national consensus indicates should be exempt, and the state legislatures form the foundation of this national consensus.[114] Arguably then, to ensure that an exemption is only granted to those offenders outlined by *Atkins*, a court attempting to define mental retardation must ensure consistency with the definitions already adopted by its state legislature. To choose otherwise would allow the judiciary to grant an exemption to an individual outside the scope of the *Atkins* holding. Thus the *Hawthorne* court's legislative inconsistency rationale for not adopting a fixed IQ cutoff was persuasive.

*Clinical Disfavor:* A second rationale offered by *Hawthorne* was the increasing disfavor among members of the medical community with the use of IQ tests in the legal context.[115] This rationale is also thoroughly supported.[116]

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109. In re *Hawthorne*, 35 Cal. 4th 40, 49 (2003).

110. *Id.* at 48 (citing NEB. REV. STAT. § 28-105.01 (West 2003); N.M. STAT. ANN. § 31-10A-2.1 (LexisNexis 2003)).

111. *Id.* at 52 (Chin, J., concurring).

112. *Id.* at 49.

113. *Id.*

114. Atkins v. Virginia, 536 U.S. 304, 311–16 (2002).

115. *Hawthorne*, 35 Cal. 4th at 48.

116. *E.g.*, AMERICAN PSYCHOLOGICAL ASSOCIATION (APA) TASK FORCE ON INTELLIGENCE,

For instance, numerous mental health professionals have argued that the fundamental purpose of the IQ test is at odds with how it is currently being used in the legal setting.[117] According to clinicians, the purpose of the IQ test is to provide "a rough approximation" of a person's intellectual functioning.[118] Thus, under most tests an "individual with an IQ of 72 may not differ substantively from an individual with an IQ score of 68."[119] Yet in many states a person's IQ score is being used as a fixed cut-off point, with those at or below the score being classified as mentally retarded and exempt from the death penalty and those slightly above being defined as not mentally retarded and thus suitable for the ultimate punishment.[120] According to mental health professionals, bright-line IQ cutoffs are unwarranted. Because the purpose of the test is only to provide a rough approximation of an individual's intellectual functioning, "there will always be a large number of persons just above any arbitrary cutoff point who differ only in minor ways from persons below the cutoff, and whose [right to exemption] will be just as valid."[121] Given this fundamental proposition, clinicians have argued that states are not justified in overemphasizing the IQ test in assessing intellectual functioning for *Atkins* purposes.

Clinicians also contend that the history and development of the IQ test prove that it is not intended for heavy use by the legal system.[122] As Professor Davis has explained, appellate courts and legislatures who rely on IQ scores as indications of mental retardation should be aware that they may be placing their faith in a diagnostic instrument that was never intended to be used in a legal context.[123] The original IQ test, Davis notes, was developed in France in the early 1900s. The test was intended to be used in elementary schools to determine whether young Parisian children should be receiving special education services.[124] A few years later, the test's questions were altered and clinicians in the United States began to adopt it. The first use of the IQ test by American psychiatrists

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INTELLIGENCE: KNOWNS AND UNKNOWNS (1995), *available at* http://www.lrainc.com/swtaboo/taboos/apa_01.html [hereinafter APA TASK FORCE REPORT]; John J. McGee & Frank J. Menolascino, *The Evaluation of Defendants With Mental Retardation in the Criminal Justice System*, *in* THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION, *supra* note 94, at 64; John H. Noble, Jr. & Ronald W. Conley, *Toward an Epidemiology of Relevant Attributes*, *in* THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION, *supra* note 94, at 17; Mossman, *supra* note 9, at 265–71.

117. *Id.*

118. Noble & Conley, *supra* note 116, at 21.

119. *Id.*

120. *E.g.*, NEB. REV. STAT. § 28-105.01 (West 2003).

121. Noble & Conley, *supra* note 116, at 21.

122. LaJuana Davis, *Death Penalty Appeals and Post-Conviction Proceedings: Intelligence Testing and* Atkins*: Considerations for Appellate Courts and Appellate Lawyers*, 5 J. APP. PRAC. & PROCESS 297, 312–21 (2003).

123. *Id.* at 312.

124. *Id.* at 313.

was on Ellis Island. The test was used to determine which immigrants should be denied admission into the country.[125] During World War I the IQ test was again reconfigured. The United States Army began using the test as a means of classifying enlistees for different duty assignments.[126] From there, the IQ test has been used for a variety of other medical classification and social service purposes, but rarely has it been used in the legal context.[127] Based on this history, Professor Davis has contended that lawyers and judges "must resist the temptation to seek easy answers from IQ tests; history demonstrates that those tests are not designed to provide the sort of assessments critical in the life or death circumstances of capital litigation."[128]

Finally, the most persuasive argument put forth by mental health professionals against heavy reliance on IQ tests is the extreme cultural bias found in most tests.[129] According to clinicians, this bias is not intentional, but instead reflects the fact that the questions and scales that form the foundation of modern IQ tests were not developed using non-white subjects.[130] As a result many IQ tests consistently underestimate the intellectual functioning of minorities.[131] Thus, if a state were to adopt an exclusively IQ-based assessment, a criminal defendant may be granted or denied an *Atkins* exemption based simply on his or her race (or cultural background), rather then on his or her true mental capacity. A biased test such as this one should arguably never be used in any legal setting.

Taken together, these three arguments more then substantiate Justice Brown's reasoning that a fixed IQ requirement is medically disfavored.

*Imprecision:* The third and final rationale offered by the court in support of its decision not to adopt a fixed IQ cutoff is the imprecise nature of the test.[132] Like the others mentioned above, this rationale is verifiable and well-supported. Clinicians have consistently pointed out that a number of other factors, besides cognitive ability, may affect an individual's test results.[133] For example, psychiatrists have suggested that

125. *Id.* at 314.

126. *Id.* at 317–18.

127. *See* History of Intelligence Testing (2003), *at* http://www.iqtest.com/history.html.

128. *Id.* at 323.

129. *E.g.*, APA TASK FORCE REPORT, *supra* note 116, at 120; Noble & Conley, *supra* note 116, at 21; *Implementing* Atkins, *supra* note 26 at 2574–75; Susan Du Plessis & Jan Strydom, *IQ Test: Where Does It Come From and What Does it Measure* (Learning Disabilities Online 2005), *at* http://www.audiblox2000.comdyslexia_dyslexic/dyslexia014.html.

130. Davis, *supra* note 122, at 130–31. *See generally* Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979).

131. *E.g.*, Noble & Conley, *supra* note 116, at 21.

132. *In re* Hawthorne, 35 Cal. 4th 40, 48–49 (2005).

133. *See* Jane Nelson Hall, *Correctional Services for Inmates with Mental Retardation*, *in* CRIMINAL

a high IQ score may be explained by the fact that the individual has already taken the test.[134] The inability to control such external factors makes a precise measurement of a person's IQ based solely on cognitive ability alone impossible. In addition to these external problems, mental health professionals have highlighted a number of intrinsic factors that may affect the test's precision. In particular they have focused on the built-in margin of error inherent to every IQ test.[135] Virtually every IQ test has between a three- and five-point margin of error.[136] In a state with a fixed IQ cutoff, this margin of error could result in someone being unjustly denied a death penalty exemption. With this type of support, the *Hawthorne* court's use of imprecision as a rationale for not adopting a fixed IQ score seems justified.

*b. Conclusion Assessment*

Given this well-reasoned and persuasive discussion, one would think that *Hawthorne* would have rejected any type of fixed IQ requirement. Instead, however, the *Hawthorne* court ultimately decided to set a general IQ range (between seventy and seventy-five) in defining subaverage intellectual functioning for *Atkins* purposes.[137] This conclusion was unjustified.

*Identical to a Cutoff:* To start, all of the rationales identified by the

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JUSTICE SYSTEM AND MENTAL RETARDATION, *supra* note 95, at 174–75; Adam Uptak, *Rising IQ Scores May Mean Death for Inmate*, S.F. DAILY J., Feb. 9, 2005, at 4.

134. *Id.*; Alan S. Kaufman, *Practice Effects* (2003), *available at* http://www.psychologicalforum.com/articles.

135. *Implementing Atkins*, *supra* note 26, at 2574.

136. *Id.*

137. *In re* Hawthorne, 35 Cal. 4th 40, 52 (2005) (Chin, J., concurring). The immediate response most readers of this article are likely to have is, "Wait, that is not the majority's holding. The IQ range was only discussed in Justice Chin's concurring opinion and thus does not represent the binding authority of the court." *See* People v. Superior Court (Persons), 56 Cal. App. 3d 191, 194 (1976). While I agree with this argument in theory, I do not agree with it in practice. I argue instead that there are a number of reasons that we should treat Justice Chin's IQ range as part of the opinion of the court. First, it is not uncommon for "inferior" courts to treat the concurring opinions of "superior" courts as binding authority. *See generally* Igor Kirman, Note, *Standing Apart to be Apart: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083 (1995). This is especially true in cases where the concurring opinion is not inconsistent with the majority. *Id.* That is certainly true in *Hawthorne*. There is nothing directly inconsistent between Justice Chin's concurring opinion and Justice Brown's majority opinion. *See Hawthorne*, 35 Cal. 4th at 43–53. Second, the temptation to treat a concurring opinion as part of the majority is particularly strong where the concurring opinion offers an explanation for a very difficult topic set forth in the majority. Kirman, *supra*, at 2085. This is also true in *Hawthorne*. The majority's holding only explains that all evidence of intellectual functioning should be considered, a seemingly very difficult standard for lower courts to apply. *Hawthorne*, 35 Cal. 4th at 49. Alternatively, Justice Chin's IQ range provides something for lower courts to hang on to, an easy standard to apply when determining if someone has subaverage intellectual functioning. *Cf.* People v. Vidal, 124 Cal. App. 4th 806, 848–49 (2004) (holding that IQ is essential for proving subaverage intellectual functioning in a pre-conviction case even though California Penal Code section 1376 makes no mention of IQ scores). For these reasons I believe it is appropriate to treat Justice Chin's IQ range as one of the conclusions established by the *Hawthorne* opinion.

court for not adopting a single IQ cutoff are equally applicable to a fixed IQ range. First, the adoption of an IQ range is inconsistent with the state legislature's approach to intellectual functioning, as expressed in section 1376.[138] As noted above, California's statute, consistent with most other states' mental retardation statutes, makes no mention of an IQ range.[139] Consequently, the court may have narrowed the category of offenders who should be eligible for a death penalty exemption according to our national consensus, a result which undermines the entire foundation of the *Atkins* decision.[140] Second, clinicians might disfavor the adoption of a fixed IQ range as much they did the adoption of a single score cutoff.[141] Adoption of a range does not remedy the fact that IQ scores are generally not suited for use in the legal system.[142] For example, a mentally retarded offender may receive an IQ score above this range not because of his true intellectual functioning, but instead because of the inherent cultural bias of the test.[143] Finally, the test's precision problems also argue against the court's adoption of a seventy to seventy-five IQ range. While use of an IQ range may alleviate some precision problems associated with the test, it cannot alleviate all of them. Modern IQ tests simply cannot control all of the external factors that might affect, with varying degrees of severity, an individual's score.[144] The supreme court would have had to adopt a range much larger than five points to accommodate all of the external factors that might affect the precision of an individual's score.

*Problems with the Chosen Range:* Even if *Hawthorne*'s earlier reasoning did not so persuasively argue against the adoption of an IQ range, the court still likely came to the wrong conclusion in fixing its range at seventy to seventy-five. The only source cited in support of the court's decision to adopt an IQ range was an amicus curiae brief filed by the AAMR.[145] According to Justice Chin, the AAMR brief mentions that most individuals with intellectual functioning problems will fall into a range of IQ scores between seventy and seventy-five.[146] By simply citing the amicus brief without more, the court does not give the full picture of the AAMR's argument. First, the AAMR points out that strict adherence to a fixed IQ range does not reflect the current best practice

138. *See* CAL. PENAL CODE § 1376.

139. *Id.*

140. *Supra* notes 112–14 and accompanying text.

141. *See* AAMR MANUAL, *supra* note 86, at 13.

142. *See supra* notes 112–36 and accompanying text.

143. *See supra* note 129.

144. *See* Uptak, *supra* note 133, at 4 (reporting that the defendant in *Atkins v. Virginia* had received a number of different IQ scores inside and outside the seventy to seventy-five range because he had taken the test numerous times).

145. *In re* Hawthorne, 35 Cal. 4th 40, 52 (2005).

146. *Id.*

for identifying someone with low levels of intellectual functioning.[147] Instead, all evidence affecting an offender's intellectual functioning should be considered.[148] Second, the AAMR contends that even when an IQ range is used to describe subaverage intellectual functioning, the range should not be fixed in all situations.[149] Determining an appropriate IQ range should begin with an identification of the score that is two standard deviations below the mean score for the specific testing instrument used.[150] That score should represent the general IQ level for someone with mental retardation. The upper and lower boundaries of any IQ range may then be determined by assessing the standard error of measurement for that instrument, as well as any other identifiable strengths or limitations.[151]

In deciding to adopt a fixed IQ range of seventy to seventy-five, the supreme court appears to have taken neither of these arguments seriously. The court ignored the AAMR's general warning that intellectual functioning should be determined based on a total assessment of all evidence which might bear on the issue. And it appears that in setting a fixed range of seventy to seventy-five regardless of the instrument used, the court disregarded the AAMR's recommendation that any IQ range should be tailored to the specific instrument used, including the standard margin of error for that instrument and any other identifiable strengths and limitations.

In light of these arguments the *Hawthorne* court was incorrect in requiring that an inmate prove that his IQ does not fall above a fixed range in order to prove subaverage intellectual functioning.

2. *Deficiencies in Adaptive Behavior*

To prove the second prong of its mental retardation definition, the court stated that a death row inmate must show limited functioning in certain basic adaptive skill areas, including "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work."[152] However, the court rejected the idea that an inmate must prove a deficit in a minimum number of these basic skills.[153] Instead, the court held that evidence of a severe enough limitation in just one of the enumerated categories could

147. Brief of the American Association on Mental Retardation (AAMR) and The ARC of the United States as Amici Curiae at 6–7, *Hawthorne*, 35 Cal. 4th 40 (No. S116670).

148. *Id.*

149. *Id.* at 7–8.

150. *Id.*

151. *Id.*

152. *Hawthorne*, 35 Cal. 4th at 47–48 (citing AAMR MANUAL, *supra* note 86, and AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS—TEXT REVISION 41 (4th ed. 2000) [hereinafter APA, *DSM-IV-TR*]).

153. *Id.* at 49.

be sufficient to support a finding of mental retardation.[154]

*a. Reasoning Assessment*

To support this holding, the court noted that most theoretical models of mental retardation focus on more than intelligence alone and instead emphasize the individual's *overall capacity*.[155] Thus, any meaningful definition of mental retardation should include an assessment of an individual's ability to perform basic adaptive skills.[156] This reasoning is well-supported.

As briefly mentioned above, a longstanding consensus has existed amongst clinicians that mental retardation should be conceptualized as a systemic disability expressed through deficient interactions between a person with subaverage intelligence and his or her environment.[157] Consequently, the medical community has uniformly required some proof of an inability to cope with everyday living as part of its definitions.[158] Beginning in 1936, the president of the AAMR, Dr. Edgar Doll, set forth what is considered to be the most influential definition of mental retardation ever developed.[159] Consistent with the medical community's accepted conceptualization, Doll defined mental retardation as a condition of "social incompetence" and began defining it to include impaired functioning in a number of broad areas, including socialization, communication, and daily living, as part of any diagnosis.[160] From that time forward, the AAMR, the APA, and the World Health Organization (WHO), have all embraced a similar conceptualization and as a result each group has consistently included a broad assessment of basic adaptive functioning in its mental retardation definition.[161]

Support for *Hawthorne*'s reasoning can also be found in the U.S. Supreme Court's jurisprudence, which, like the medical community, seems to have endorsed the concept that mental retardation is more than just a condition of subaverage intelligence. In *Atkins*, for instance, the Court held that a finding of mental retardation was sufficient to exempt an individual from the death penalty.[162] *Atkins*, however, was not based

154. *See id.*

155. *Id.*

156. *Id.*

157. *See supra* note 87 and accompanying text; AAMR MANUAL, *supra* note 86, at xi.

158. *See* AAMR MANUAL, *supra* note 86, at 13, 24.

159. *See id.* at 80; MARY BEIRNE-SMITH ET AL., MENTAL RETARDATION 47 (6th ed. 2002) ("Arguably, Doll's [concept of mental retardation] is the most important . . . , as it has continued to influence the defining of the condition.").

160. *See* BEIRNE-SMITH, *supra* note 159, at 20; Nancy Cantor & John F. Kihlstrom, Social Intelligence (2000), *available at* http://ist-socrates.berkeley.edu/~kihlstrm/social_intelligence.htm.

161. *See* AAMR MANUAL, *supra* note 86, at 24–25; APA, *DSM–IV–TR*, *supra* note 152, at 40; WORLD HEALTH ORGANIZATION, ICD-10 GUIDE FOR MENTAL RETARDATION 1 (1996) [hereinafter ICD-10 Guide], *available at* http://whqlibdoc.who.int/hq/1996/WHO_MNH_96.3.pdf.

162. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

solely on the conclusion that offenders with mental retardation are less culpable because of their deficient intellect. Instead, the Court's holding also relied on the fact that the intellectual deficits associated with mental retardation commonly manifest themselves in an array of real world impairments.[163] And it is these impairments which in large part make imposition of the death penalty against people with mental retardation unconstitutional. According to the Court, likely deficits in basic skill areas such as communication, movement, impulse control, and environmental reactivity render a person with mental retardation less susceptible to the principle aims of the death penalty—retribution and deterrence.[164]

In light of the Court's conceptualization of mental retardation—as well as the medical community's—*Hawthorne*'s reasoning in this area seems well-supported.

*b. Conclusion Assessment*

With such persuasive reasoning in mind, the logical choice for the California Supreme Court should have been to require a death row inmate to show some evidence of an inability to function normally in his or her environment. But the court did not quite reach this conclusion, and instead stated that any evidence offered by the inmate to meet the second prong of its definition would have to fit into one of several enumerated adaptive functioning categories.[165] Evidence of a deficiency beyond "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work," would not be sufficient to meet the court's definition.[166] The court's conclusion in this area was ultimately incorrect.

Requiring an inmate to prove deficiencies in a limited number of adaptive skill areas is inconsistent with the medical community's current understanding and approach to the mental retardation condition. According to current research, a person with mental retardation may express his or her inability to cope with everyday living in an untold number of ways.[167] Thus, the medical community has consistently endorsed a definition of mental retardation that allows for proof of impairments in a variety of global skill categories, rather than requiring evidence of limitations in certain finite areas.[168] For example, the 2002

163. *Id.* at 318.

164. *Id.*

165. *In re* Hawthorne, 35 Cal. 4th 40, 48 (2005).

166. *See id.*

167. *See* AAMR MANUAL, *supra* note 86, at 41–43; GEORGE S. BAROFF & J. GREGORY OLLEY, MENTAL RETARDATION: NATURE, CAUSE, AND MANAGEMENT 36–46 (3d ed. 1999).

168. AAMR MANUAL, *supra* note 86, at 41–43. *See also generally* Henry Leland, *Adaptive Behavior Scales*, *in* HANDBOOK OF MENTAL RETARDATION (Johnny L. Matson & James L. Mulick eds., 1983). A common response to this contention will be that the 1992 AAMR definition included a list of

AAMR definition, considered by many to be the best definition of mental retardation available,[169] states that mental retardation is characterized by "significant limitations in . . . adaptive behavior as expressed in conceptual, social, and practical adaptive skills."[170] The definition put forth by the World Health Organization is similar, only requiring the individual to show some deficiency in any one of four broad adaptive categories, including cognitive skills, language skills, motor skills, or social abilities.[171] Given this Note's repeated emphasis on the importance of being consistent with the medical community's current definition and conceptualization of mental retardation,[172] the *Hawthorne* court's conclusion in this area can only be described as incorrect.

The court's decision to require an inmate to conform his proof to a limited number of adaptive skill categories is also incorrect because it narrows the number of offenders who could be eligible for *Atkins* relief. As discussed above, *Atkins* created a categorical exemption from the death penalty for those individuals who possess some adaptive skill deficiency which makes them immune from the two principle aims of the death penalty—deterrence and retribution.[173] While proof that an inmate suffers a deficiency in any of the adaptive skills mentioned in *Hawthorne* would almost certainly lead to the conclusion that deterrence and retribution do not apply,[174] the court's list is not exhaustive. The proposition that a person could possess a deficit in some adaptive skill area not listed in *Hawthorne* (e.g., impulse control), but which still renders the individual undeterrable and less culpable is not subject to debate.[175] In denying a death row inmate—who has already shown

adaptive functioning areas almost identical to what is included in *Hawthorne*. *See* AAMR MANUAL, *supra* note 86, at 41. However, the 1992 manual indicated that this list was included for identification of support areas only. *Id.* For identification and classification purposes, the 1992 manual focused on broader adaptive skill areas. *See generally* AAMR MANUAL, *supra* note 86.

169. *See, e.g.*, Ellis, *supra* note 106, at 13 ("The formulation in the 2002 AAMR definition appears to be . . . better suited for forensic evaluations in death penalty cases.").

170. AAMR MANUAL, *supra* 86, at 1.

171. ICD-10 Guide, *supra* note 161, at 9.

172. *See supra* notes 98–102, 105–08 and accompanying text.

173. Atkins v. Virginia, 536 U.S. 304, 319–20 (2002).

174. For example, *Atkins* noted that a deficiency in communication ability would make an individual less culpable and less deterrable. *Id.* This skill area was also included in the enumerated list set forth in *In re Hawthorne*, 35 Cal. 4th 40, 47–48 (2005).

175. For example, consider the following hypothetical. Joe is a forty-three-year-old male who has been on California's death row for five years. Joe has undergone several intelligence tests, each of which results in an IQ score between sixty-three and sixty-five. In 2005, Joe files a habeas petition in the Superior Court for the County of San Francisco seeking an exemption from his sentence of death based on *Atkins*. In addition to offering his IQ scores, Joe submits the following information. Starting at the age of fourteen, Joe began to run away from home every time he felt sad and in total ran away more than thirty times. On two of the occasions Joe sexually assaulted a woman. According to Joe, each of the women, whom he admitted to not knowing, asked him to engage in the sexual encounter. Finally Joe submits evaluations from several of his elementary school teachers who all note that Joe smiles incessantly in class.

subaverage intellect—the right to prove such a deficit, *Hawthorne* may withhold an *Atkins* exemption from someone who could clearly be eligible for relief.

The obvious conclusion from these two arguments is that the court's decision to require proof of adaptive functioning deficits in a certain limited number of categories was incorrect. As Justice Brown's well-supported reasoning suggests, the court should have taken a broader approach and required the inmate simply to show some evidence of an inability to function normally in his or her environment.[176]

## CONCLUSION

As the preceding discussion suggests, the *Hawthorne* court's definition of mental retardation and rationale for that definition cannot be singularly categorized as either correct or incorrect. Instead *Hawthorne* offers a combination of both positive and negative contributions to the debate over how to define mental retardation in *Atkins* cases.

As I have argued, appellate courts and legislatures struggling with the definitional issue in the future should look to *Hawthorne* for guidance on a number of topics. This includes the court's implicit conclusion that it should tackle the definitional issue rather than deferring to the legislature, and the court's decision to adopt a clinical based definition of mental retardation. Additionally, the court's discussion of the exact contours of the two essential prongs of mental retardation—subaverage intelligence and adaptive functioning limitations—can and should be followed in future opinions.

In contrast, the deficient reasoning and incorrect conclusions *Hawthorne* exhibits should be avoided. For instance, a future court should fill in the gaps left open by the California Supreme Court reasoning as to why a court should decide the definition issue and why a clinical based definition of mental retardation is the appropriate choice.

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If applied honestly, Joe would not be able to meet the second prong of the *Hawthorne* court's mental retardation definition and thus his petition should be denied. None of the evidence submitted by Joe appears to fit exactly within the adaptive skill areas listed by the court, including "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." However, the adaptive skill deficiencies highlighted by Joe would make him eligible for relief under *Atkins*. As *Atkins* noted, deficits in impulse control (running away), environmental reactivity skills (believing women wanted sexual encounters), and motor skills (incessant smiling) all make an individual less susceptible to the principle deterrence and retribution aims of the death penalty.

176. One issue with this conclusion which deserves mentioning is that by making the skill categories too broad the standard would allow inmates to use their criminal behavior as evidence of adaptive functioning deficiencies. However, this concern can easily be dismissed by the fact that the inmate would still need to show some manifestation of adaptive functioning problems before the age of eighteen. *See* AAMR MANUAL, *supra* note 86 (detailing the age of onset requirement).

Some of the persuasive arguments a court might offer have been articulated above. Finally, no appellate court or legislature should attempt to mirror *Hawthorne*'s conclusion on what evidence must be shown in order to prove subaverage intelligence and deficiencies in adaptive behavior. As I have suggested the correct conclusion should be to allow a defendant to offer any evidence of subaverage intellectual functioning and to permit a showing of deficient adaptive behavior in any number of broad categories as opposed to a finite list.

In conclusion, while some may argue that this Note is too harsh on *Hawthorne* and others may argue that it offers too much praise, my only hope is that it may spark lively debate on an important issue.

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